California Law Review

VOL. VII MARCH, 1919 Number 3

Procedural Reform

THE process of adjusting the law to the altered needs of economic and social life—a process that is never ending—has been in recent years and in particular at the present time is seriously engaging the minds of sober-minded people the world over. The relations between independent sovereignties, the internal structure of states, the institutions of private law, such as property, contract and the family, theories of responsibility and liability both in criminal and in civil law, either are undergoing transformation through dramatic and cataclysmic changes or are suffering modification through the influence of forces operating slowly and silently, though none the less ceaselessly. Procedural law, using the phrase in the widest sense, has not been exempt from the general movement.[1]

I.

One of the most notable phenomena of this latter age in the the field of procedural law has been the encroachment by admin-

[1] To one who wishes to follow the movements of procedural reform in the United States, the Bulletins and Journal of the American Judicature Society, of Chicago, are indispensable. A general acknowledgment is here made to these publications, which have been constantly referred to during the preparation of this article. In the same manner acknowledgment is made to the Preliminary Report on Efficiency in the Administration of Justice, prepared by Charles W. Eliot, Moorfield Storey, Louis D. Brandeis, Adolph J. Rodenbeck and Roscoe Pound for the National Economic League, 1914. This report, which bears evidence of having been in large part the work of Dean Pound, is the classical statement of the new program. See also Dean Pound's epoch-making papers: Causes of Popular Dissatisfaction with the Administration of Justice (1906) 395, 413; The Organization of Courts, Minnesota Bar Association Reports, 1914, 169; Regulation of Judicial Procedure by Rules of Court, 10 Illinois Law Review, 163; Principles of Procedural Reform, 4 Illinois Law Review, 388, 491; The Administration of Justice in the Modern City, 26 Harvard Law Review, 302; Procedure in Common Law, California Bar Association Reports (1916) 86, and remarks pp. 129-140. Reference should also be made to Justice Through Simplified Procedure, a Symposium, in the Annals of the American Academy of Social and Political Science. For a full bibliography of the literature on revision of the judicial system, see California Bar Association Reports (1916) p. 300; 11 Illinois Law Review, 451.

istrative bodies upon the jurisdiction of the ordinary courts—a tendency observable in England, the traditional home of justice according to law, as well as in our own country. It is true that this movement is not yet so marked in England as it is here, and that it has begun to evidence itself more recently there than with us. For example, in the case of the Workmen's Compensation Acts, Parliament left the determination of the questions arising under the acts to the courts, whilst it has been the general practice in our country with its greater distrust of magistrates and courts to place the matter in the hands of extra-judicial bodies. Later English statutes, however, notably those dealing with social problems, such as health insurance and old age pensions, follow the American practice in withdrawing the settlement of questions under the acts from the courts. It is unnecessary, however, to enumerate instances to illustrate so obvious a truth as that administrative law is everywhere developing at a more rapid rate than the civil law and to some extent at its expense.[2] By reason of this process civil procedure is constantly becoming relegated to a position relatively less important than that which it formerly occupied. Modern tribunals erected to administer the new machinery have rarely followed, save in a broad and general way, the analogies of the procedure obtaining in the civil courts.[3] To a certain extent the correcting hand of the courts is constantly guiding and directing the new administrative tribunals, and particularly is this the case in our own country where the fundamental law of the constitution controls every individual, officer, tribunal and legislative body. But this guidance and control is general in its nature and is bound to become less important as there is developed through the reciprocal interaction of the boards and courts a definite body of administrative law.

The lessened importance of the ordinary law of civil remedies is evidenced by a practice becoming increasingly frequent, namely,

---

[2] Dicey, The Development of Administrative Law in England, 31 Law Quarterly Review, 148; id., Law and Opinion in England (2d ed.) xliii. Cf. remark of the editor, Sir Frederick Pollock, 6 Law Quarterly Review, 238: "English tradition favors decision by a legal tribunal of all cases which directly or indirectly may involve legal questions." The Growth of Administrative Law in America, 31 Harvard Law Review, 644, is a suggestive and learned contribution. Cf. Alvarez, The Progress of Continental Law in the 19th Century, 48-50. It is perhaps worthy of notice that in the days of the Tudors, English practice was leaning toward the employment of commissions. Cf. 43 Eliz. c. 12, commissioners to determine disputes concerning insurance.

[3] Pillsbury, An Experiment in Simplified Procedure, 3 California Law Review, 181.

that of creating in our greater centres of population tribunals with special summary jurisdiction, modern courts of piepoudre, with the difference that they are more particularly courts for the wage-earner than for the merchant. Somewhere the Italian criminologist Ferri speaks of the codes of criminal procedure as being codes modeled for gentlemen, and allowing for the exaggeration, the same might be said of civil procedure. Ferri meant that the traditional code of criminal procedure contemplates a fair and equal fight between society and the individual and therefore implies that the individual shall have a certain amount of social and economic independence, not in fact possessed by the greater part of those most directly subject to the penalties of the criminal law. Probation laws, indeterminate sentence laws, psychopathic laboratories, juvenile courts, and other devices, punitive, reformatory and preventive, are rapidly lessening the modicum of truth in Ferri's generalization respecting the codes of criminal procedure, though at the same time diminishing to some extent the importance of the classical principles of the criminal law. In like manner, such institutions as municipal courts, small debtors' courts, conciliation courts, domestic relations courts, are occupying a portion of the field of civil remedies. The individualistic theory of procedure is as much neglected by such courts as it is by the agencies before mentioned in the field of criminal procedure. Such institutions are serving to bring the results which law seeks to achieve to many who would otherwise be devoid of legal protection in respect to the matters determined in these tribunals. At the same time they are occupying a portion of the field formerly occupied by ordinary tribunals proceeding in the traditional manner. In the case of the Municipal Court of Chicago, the simplified, efficient and expeditious procedure of the court has drawn to it civil matters of great importance.[4]

If the workingman is no longer obliged to appeal to the ordinary courts with their judicial remedies to collect his wages, to settle his domestic troubles, to receive recompense for injuries received in the course of his employment, the merchant and the manufacturer (at the opposite extreme of the economic system) have voluntarily availed themselves of non-judicial remedies to adjust their legal disputes.[5] The arbitration clause in commercial contracts has in England almost ousted the regular courts of

[4] Reports of the Municipal Court of Chicago.

[5] Cohen, Commercial Arbitration and the Law (1918); 2 Journal American Judicature Society, 43-58 (August, 1918).

jurisdiction in commercial matters, and this notwithstanding the unfriendliness of the courts and their attempt, by the establishment of the so-called Commercial List, under the power of amendment of procedure granted the courts by the Judicature Acts to create what is in effect a commercial court operating under a more expeditious procedure than the ordinary tribunals.[6] If in America the arbitration clause has not yet attained the practical universality which it has secured in England, adjustment of legal difficulties through boards of trade and similar agencies is very frequent, and with improved organization of business is becoming more frequent every day.[7] The history of the Commercial List in English practice would seem to show that business men cannot be tempted by a judicial procedure as simple and liberal as that which they enjoy before their own arbitrators, to submit their legal difficulties to professional judges. Evidently, as is indicated by their neglect of their opportunity to have their disputes settled before professional judges in a highly expeditious and simple manner, they prefer the interpretation of the substantive law given by members of their own trade to its authoritative exposition by the courts. Possibly the expense of legislation even of a summary kind is an additional reason for the merchant's unwillingness to go into court. The Judicature Commission, composed of some of the ablest legal minds of England, so far back as 1874 recommended that mercantile trials should be had before a judge assisted by two mercantile experts.[8] Had this proposal been adopted, English practice might have been assimilated to that existing in several of the continental nations of Europe, as for example in France where the merchants administer the commercial law in their own courts, whose judges are selected by the merchants themselves out of their own class.[9] But what

---

[6] Rosenbaum, Commercial Arbitration in England (Bulletin XII, American Judicature Society) 49; id., The Rule-Making Authority, 131, 136.

[7] For a description of the work of the Arbitration Committee of the New York Chamber of Commerce, see remarks of its chairman, Charles L. Bernheimer, at the 1918 Conference of Bar Association Delegates, of which Mr. Root was chairman, 5 American Bar Association Journal, 45-52 (January, 1919).

[8] Rosenbaum, The Rule-Making Authority in the English Supreme Court, 132.

[9] Mitchell, The Law Merchant, chap. iii. The absence of the special court of commerce from our system has been attributed to the existence of a popular element, the jury, in our administration of justice. Goldschmidt, *Du droit commercial et des tribunaux de commerce. Revue de droit international,* 1870, 557, 564.

the law making power in England declined to do has come about in practical effect through the operation of voluntary extra-legal agencies.

The unwillingness of English law makers officially to recognize the autonomy of the merchant group stands in striking contrast with the French practice. Indeed, French law has ever been disposed to grant a greater liberty to groups within the state than has our own or the English system. The family council with its extensive powers in the matter of guardianships and other family questions seems to our minds an exotic institution. And it has not yet occurred to the English or American legislator to permit the inspection of mines under safety appliance acts to be carried out by representatives selected by the miners themselves, as is done in France.[10] The merchants' courts afford another illustration of a tribunal of a sort unknown to English law or to our own. History and tradition in large part account for such differences. For example, the existence of the jury in the civil procedure of England to some extent serves to explain the fact that it was unnecessary in that country to perpetuate the mediaeval merchants' courts. The popular or lay element in the administration of justice was supplied by that institution. Lord Mansfield with his special juries of merchants so shaped the ordinary civil law in the eighteenth century when its need of re-adaptation was greatest as to enable it to respond to the needs of commerce. The law thus evolved is the basis upon which the modern business man demanding even more flexibility rests his demands for arbitration. Social needs are worked out in some manner, if not by legal, then by extra-legal means, and in the modern organization of economic life the extra-legal agencies possess sanctions almost as effective as those of the code of civil procedure. Observation of recognized legal institutions by no means exhausts the study of the law-making process.

Whether or not the arbitration principle receives indefinite expansion lies, of course, in the bosoms of the gods.[11] It is sufficient to point out the possibility that a number of matters that now present themselves before the official tribunals may

---

[10] See various examples in "Progress of Continental Law in the 19th Century", pp. 57, 83.

[11] For a humorous but thoughtful picture of the future, describing the "café courts," etc., see Wells, The Man in Court, 267, 283, a book written by a Justice of the Municipal Court of New York City, full of keen psychological insight and based on actual experience.

hereafter be relegated to the arbitration of voluntary tribunals. The tendency to shift the determination of many questions to administrative and presumably specialized agencies rather than to leave them to professional courts for decision may conceivably join itself to the other tendency on the part of groups to settle and adjust the disputes of the members of the group. Whether or not such a result would be desirable is a debatable question, but whatever the doubts the student of procedural questions should not be oblivious of present practice, nor shocked at its extension. The existing system of procedure is but half understood if the observer closes his eyes to the fact that already important classes of the community are determining their disputes before tribunals of their own selection, that the principle of authoritativeness has already undergone a great diminution, and that the modern administration of law frankly admits the existence of classes and groups in the community.[12]

If, however, the judgment and the execution are becoming less important in the processes of modern life than they were a couple of generations ago, it will not do rashly to conclude that the compulsive principle has been entirely elbowed out from the law of today, or is likely to disappear in the future. On the one hand legal remedies to a large extent supply the ultimate force behind the extra-legal ones. On the other hand the very cumbersomeness of judicial procedure is one of the impelling causes toward the creation of those extraordinary instrumentalities which today are serving to administer so large a part of the law. In both directions the organization of procedural law is one of great importance, and the study of its adaptation or non-adaptation to the affairs of modern life demands serious attention.

II.

One of the fundamentals usually assumed as axiomatic in all discussions regarding procedural reform is that justice should be administered by the courts with cheapness. But the *advocatus diaboli* may well be heard upon the contrary of this proposition before the assumption is granted. It may be urged that it is not necessarily the case that cheapness in the pursuit of ordinary judicial remedies is altogether desirable, and that it is conceivable

[12] "All labor legislation to be of worth has to be class legislation in one sense of the word." Ely, Contract and Property in their Relation to the Distribution of Wealth, II, 644; Freund, Standards of American Labor Legislation, 269.

that a system of judicial remedies may rest upon a theory, express or implied, that application to the courts for relief should rather be discouraged than encouraged. The petty litigant and his attorney are likely to be unqualified nuisances; cheap justice has a distinct tendency to provoke unfounded and speculative litigation to the detriment of the community. The poor man with the tort claim for personal injuries is but one side of the picture; the ambulance chaser is the other. As a matter of fact English legal administration appears to the uninitiate to be organized upon a principle which makes the cost of resort to the courts considerable, though it casts the final burden of the expense upon the party in the wrong.[13] Under such a plan only questions which really demand judicial intervention will, in general, be brought into court. For neither will plaintiffs seek to enforce speculative claims, nor will defendants attempt to interpose unfounded defenses where costs are deterrent. If people lose money rather than gain by resisting or attempting to delay the enforcement of fair demands against them, presumably they will not resort to such means. At any rate the assumption that cheapness of justice is an absolute desideratum is by no means axiomatic.[14]

The determination of even so fundamental a proposition as the theory upon which the administration of justice should be founded with reference to the question of expense can, in view of the lack of available material for investigation, be made upon grounds of sentiment or prejudice. Before any opinion that is worthy of serious discussion can be expressed, it is necessary that the working of various systems should be observed in detail. Take, for example, one special sort of litigation—that in connection with negligence cases. What is the sum total of the recoveries obtained in a given city in a given time? What proportion does this sum total bear to the total expense of liti-

[13] Leaming, A Philadelphia Lawyer in the London Courts, 97-100; Higgins, English Courts and Procedure, 98 (Bulletin XI, American Judicature Society). English writers criticize the expense. Dicey, Law and Opinion in England (2d ed.) 209.

[14] The Roman law adopted a similar plan. Institutes, 4, 16, pr. (Moyle's trans.) "It should here be observed that great pains have been taken by those who in times past had charge of the law to deter men from reckless litigation, and this is a thing that we too have at heart. The best means of restraining unjustifiable litigation, whether on the part of a plaintiff or of a defendant are money fines, the employment of the oath, and the fear of infamy. . . . . In certain cases where the defendant denies his liability the action is for double or treble the original claim, as in proceedings on unlawful damage, and for recovery of legacies bequeathed to religious places."

gation in that class of cases? What ratio do these figures bear to the total loss by accidents occasioned by negligence? How do these figures compare with figures in connection with similar litigation in other cities and industrial centers? Possibly if information were at hand on such questions and others like them a study might be made which would lead to constructive results. Possibly it might lead to the conclusion, as has been suggested by eminent jurists, that the whole matter of personal injury claims might well be removed from the field of ordinary civil remedies and turned over to administrative tribunals.[15] But it may also be a possibility that a study of the problem might show that many of the evils incident to this sort of litigation are due to the cheapness and ease with which such claims may be presented to the courts under the systems usually prevailing in our states.

III.

Whatever may be said concerning the possible merit of an organization of procedure systematically designed to discourage trifling and unjust litigation, the assumption that justice should in all cases be cheaply procurable, without delay and by simple means, rests in our country upon such solid ground in the sentiments of the community that it must be accepted as a basic principle in studying the problems. There seems to be little welcome in American theory for the notion that it should ever be an expensive matter to invoke the aid of the courts. Even such moderate suggestions for the purpose of relieving congested appellate calendars as that the costs of appeal should be made high to discourage frivolous and unmeritorious appeals, or that penalties should be imposed upon unsuccessful appellants, usually meet with scant sympathy. So, too, there seems to be a disposition to leave the amounts delimiting the jurisdiction of courts substantially unaffected. In the State of California, for example, the dividing line of jurisdiction between the justices' courts and courts of superior jurisdiction and the test for the right of review by appellate courts has remained at three hundred dollars since 1862, though during this period the purchasing power of money has rapidly declined.[16] Yet few lawyers or laymen argue that the evils of congested calendars in appellate

[15] Storey, The Reform of Legal Procedure, 81-85.

[16] Cal. Const., Art. VI, § 4; Amendment, 1862, to Art. VI, § 4; Cal. Code Civ. Proc., § 76. On the history of the adoption of the elective system in the United States, generally, see Carpenter, Judicial Tenure, 178-185.

courts should be remedied by the arbitrary denial of the power to appeal save in cases of considerable importance with respect to the amount involved in controversy. The passion for equality which characterizes us as a people forbids resort to all such artificial palliatives. There is a general sentiment that the highest courts should remain open to the humblest litigant.

The tendency to multiply judicial offices represents a crude attempt to meet the demands that all should be afforded an opportunity to resort to the courts and have their cases determined with some degree of despatch. The singular spectacle is presented by reason of this multiplication of judicial offices, that many of our individual states require more judges to perform the judicial work of the state than the United Kingdom of Great Britain and Ireland. Thus, in 1900, Massachusetts, with less than one-twelfth of the population of England and Wales, required many more judges. The figures were: 51 judges of the higher courts in Massachusetts as against 34 in England and Wales; and a total of 144 judges altogether in Massachusetts as against 93 in England and Wales. Mr. Moorfield Storey points out that if England were equipped with judges in the same proportion to population as Massachusetts, she would have had 1666 judges instead of 93.[17] California now has 145 judges of the Superior Courts, District Courts of Appeal and Supreme Court. To complete the comparison between the two systems, the federal judges, the members of the industrial accident board and the justices of the peace should be added to the number of judges in California. It is only fair to point out that the English system—which has been introduced into the British colonies—stands alone in providing very few judges for the administration of justice. France is liberally provided with magistrates, whilst Germany in 1906 had nearly 9000 judges.[18] The English policy has been to magnify the importance of the individual judge and the dignity of the judicial office by limiting the number of judges, securing permanency of tenure and paying very large salaries. We have proceeded for the most part in the opposite direction, and in this respect our practice resembles that of the continental states of Europe rather than that of the country from which our legal system is derived.

In one respect the American state judicial system, outside of a few of the original states of the Union, is comparable with

[17] Storey, The Reform of Judicial Procedure, 187-189.
[18] 124 Preussische Jahrbücher, 428.

no other well-known system save the Russian as it existed under the Empire of the Czar. Nowhere but in Russia under the old régime and in the States of our Union has the elective system in modern times been applied to the judiciary.[19] In our States, however, the election is usually not made by the voters at large, but by those of the counties. Except so far as the courts of appeal are able to correct verdicts and judgments, usually upon points of law alone, each county is almost autonomous in the administration of justice. Every official connected with the courts owes his position to his neighbors, and not to the people of the State in general. The judge, the sheriff, the clerk, the bailiff, the stenographer, the district attorney, the jury, the police, all are elected by the people of the county or are appointed or chosen by some one so elected. No direct correlation exists between these officials and the officials of the state. When to this extreme decentralization in the administration of justice is added the fact that the judge is usually elected for a term of years, more or less short, and in some states is subject to popular recall even during that term, it is apparent that there could hardly be a worse machinery devised by which to secure that a rigid system of legal rules should be applied inflexibly to the facts which may be the subject matter of litigation.[20] Only one further step in the process of submitting our legal development to the direct influence of temporary political and social influences could be taken, and that would be to deliver the entire machinery of justice into the hands of non-expert laymen. There have been in the history of our judicial system evidences of a desire to effect this result.[21]

It is possible that this unique system of organization whose result has been to minimize the power and importance of the individual judge is a mere accident in our historical development, and that the future evolution of our procedural system may not be conditioned by its past, in other words, that the present situation represents only a transitional stage and not a necessary result of American life and thought. But it should be noted in this connection that this localizing and decentralizing movement has hitherto been the dominating one in respect to our judicial organization. The original states began with

[19] Encyclopaedia Britannica (11th ed.) Art. Russia, xxiii, 577. In Russia, the elective principle was applied only in the case of the lower magistracy.

[20] California Bar Association Reports (1917) 25.

[21] For example, in New Jersey. Baldwin, The American Judiciary, 257.

courts framed on the English model, with judges appointed by the executive and holding office during good behavior. A very few states still continue to retain this system or something quite analogous to it. But the overwhelming majority have long since abandoned this principle, the states formed since 1850 uniformly. The constitutional legislation of California concerning the judiciary is typical as illustrative of the localizing tendency.[22] The Constitution of 1849 provided for a Supreme Court with appellate jurisdiction only, whose judges were elected by the people of the state, and for District Courts with trial jurisdiction whose judges were elected by the people of their districts, which usually embraced several counties. The Constitution of 1879 abolished the District Courts and substituted in their place Superior Courts with judges elected by the people of the respective counties. When in 1904 the District Court of Appeal was added to the Supreme Court as an appellate tribunal, the justices were elected not by the people of the state but by the people of the districts within which the Court exercised jurisdiction. Even the minor magistrates, the police judges and the justices of the peace, are elective officials, and chosen from smaller local subdivisions than the county.

These features—the multiplication of judicial offices, the general adoption of the elective principle in the selection of the magistrates to fill these offices, the substitution of terms of office in place of tenure during good behavior, and finally the practice of selecting from local subdivisions of the state magistrates and others charged with the function of administering the law are so general as to warrant their being designated as characteristics of American judicial organization. All these features have the purpose to make the courts more responsive to popular will and to diminish the principle of authority. Recent practices and suggestions do not justify the belief that the movement in the direction of popularization has lost its force. On the contrary, they suggest that it is proceeding with accelerated velocity. Thus, the judicial recall has been adopted in several states besides California, and its possible adoption in other states is deemed so probable that an important section of the American Bar Association has been created to oppose the movement.[23] One state, Mississippi, which long preserved the appointive principle, has recently abandoned it in favor of the elective system.

[22] Id., 312.
[23] Judson, The Judiciary and the People, 179.

A strong but hitherto unsuccessful attack has been directed against that principle in Massachusetts, and the platforms of radical parties demand the selection of federal judges by popular vote and the abolition in the federal system of the principle of tenure during good behavior. Of a different character, but indicative of popular temper in respect to the power and dignity of the judicial office is the suggestion that courts be denied the power, at least by a mere majority of judges, to declare legislative acts unconstitutional, a suggestion that became the subject of a constitutional amendment in North Dakota.[24] In some instances, the courts have been denied the power to review the constitutionality of legislation conferring powers upon certain favored agencies,[25] whilst in England trade unions have been declared by Act of Parliament immune from suit.[26] The power of courts to punish for contempt has, in some states, been limited by provisions that trials in such matters should be had before juries.[27] The effect of the unlimited right of appeal has also tended to weaken the power of the judge, especially in jury trials, where he is usually restrained by constitutional limitations from commenting upon the evidence. Finally, the position of the courts in respect to the development of the legal system is constantly becoming relatively less important. Legislation has assumed a more important role in the modern state as the basis of the creation of law than is occupied in the earlier stages of the development of our legal system. As Dean Pound points out, there is little room today for the creative task which such men as Marshall and Story and Kent performed in the first half of the last century. The work of the courts has become chiefly that of interpretation, rather than the evolution of new legal principles.[28]

It may be doubted whether all the desired results in the direction of rendering the administration of law responsive to popular will have followed from the experiments tried in our country minimizing the magistrate's powers. Mr. Albert M. Kales, in an interesting study made a few years ago, demonstrated by a review of the cases upon the question of the con-

---

[24] American Bar Association Reports (1917) 377.

[25] Cal. Const., Art. XII, § 22 (Railroad Commission); Art. XX, § 21 (Industrial Accident Board).

[26] Jenks, Short History of the English Law, 329.

[27] Beale, Contempt of Court, 21 Harvard Law Review, 161.

[28] Preliminary Report on Efficiency in the Administration of Justice, 10. Cf. however, Carpenter, Judicial Tenure in the United States, 210.

stitutionality of various pieces of social legislation that it was for the most part the elective courts that had held such laws invalid, whilst the appointive courts as a rule had sustained their constitutionality.[29] A similar investigation with reference to the question as to the relative importance attributed to procedural points by elective and appointive courts respectively would, it is believed, establish the proposition that the latter courts are on the whole more ready to decide questions upon their merits than the former. Some figures may be of interest upon this matter. Between 1907 and 1909 out of 325 cases examined, in the English courts, there were only two reversals on points of pleading, a ratio of 1 to 162. Such points were discussed in only one case out of every thirty-six. In Massachusetts, during 1910-1911, there was only one reversal on such points out of every 92 cases, and discussion of pleading points in one out of ten cases. When we pass to elective courts, in New York between 1909 and 1911, one out of thirteen cases was reversed on the pleadings; in Ohio, one out of nine; in California, during the same period, one out of fifteen.[30] Rules of procedure have sometimes been shields behind which the timid magistrate may avoid the responsibility of deciding something that he would rather not decide; a system that holds in its very essence a threat against the security of judicial tenure can hardly produce an attitude of boldness on the part of the judges. It must be remembered, however, that at the time Mr. Kales' study was made, the elective system was scarcely an actuality, as indeed he himself elsewhere points out. The candidates for judicial office as for other offices were selected by those persons controlling political machines; the voter merely had an apparent choice between the appointees of party managers. The introduction of the direct primary and of the principle of non-partisanship in respect to judicial candidates have, however, largely diminished the effect of the criticisms made against the elective judiciary. But the fundamental fact remains even under such improved machinery that the judicial administration for the most part remains based in our country upon a principle infusing a more extensive popular element into judicial administration than is elsewhere the case.

[29] Cf. Hall, Selection, Tenure and Retirement of Judges, 16-18 (American Judicature Society, Bulletin X).

[30] Figures taken from article by Professor Whittier, Notice Pleading, 31 Harvard Law Review, 508, though they are cited by the learned author for a different purpose.

Any proposed ameliorations in present conditions must proceed from existing facts. Unfortunately arguments too often set out from abstract theories concerning the nature of law that no longer have place in the modern world. Thus a distinguished lawyer in a series of able articles published a few years ago upon the subject of procedural reform says: "This general respect for the courts is induced, not only by the ability and purity of the personnel of the judges, not only by the efficiency of the executive branch of the government assigned to enforce the judicial decrees, but also and to a very great extent, by the mysterious dignity of the courts. The scarlet gown and flowing wig of the Lord Chief Justice of England, the black robes of the Justices of the Supreme Court of the United States, greatly increase the weight of their decrees; and every habit or institution which tends to reduce the courts to the level of the litigants and the public over whom they hold sway tends to hamper their exercise of the function we are now considering—the production and maintenance of a general respect for law."[31] Conceding the truth of the subtle connection between institutions and external forms, it may well be doubted whether the twentieth century man is much affected by the "mysterious dignity" of the courts. He has no particular reverence for the wig and gown, which he regards rather as anachronisms than as solemn symbols. Respect for law must find a wider basis upon which to rest than is afforded by a reverence for mere external incidents or even for the abstract conception of a set of forms absolutely moulding and determining human conduct.

IV.

Constructive remedies for the improvement of legal administration and procedure usually set out from the theory that our courts must be emancipated from the limitations imposed by rigorous legislative rules, thus falling in line with the general tendency to substitute flexibility for rigidity, discretion for mechanical rule of thumb, freedom controlled by opinion for authority resting on power. Already much has been accomplished in this direction through an altered attitude on the part of courts with respect to the matter of technical errors in the admission of evidence and informalities in pleading and practice. But a demand exists for an even more thorough reform, and in this

[31] Sims, The Problem of Reforming Judicial Administration in America, 3 Virginia Law Review, 604.

demand the American Bar Association leads the way. Through its influence the Supreme Court of the United States has in recent years effected a complete revision of its rules, and in some states, the entire matter of procedure has been left to be determined by rules of court. It is probable that the time is not remote when rules of procedure will be established not by legislative action but by the courts aided by representatives of the bar. The model afforded by the English Rule Committee under the amendments to the Judicature Act may not be entirely suitable to American conditions. Under our social and political system it will be necessary, no doubt, to give a wider representation to trial judges and members of the bar than exists in the case of the Rule Committee. However, the Rule Committee is worthy of most serious study by American students. A quotation from a description of its powers and organization by a careful and competent observer from our own country, may be worth reproducing.[32] "The authority to make rules of procedure is now vested in a committee of twelve persons, who include the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of the Probate, Divorce and Admiralty Division, four other judges of the Supreme Court, two barristers and two solicitors, the four last-named being representatives of the Bar and of the Law Councils respectively. In its discretion lies the making or amending of all rules affecting the sitting of the court, the duties of its officers, pleading, practice, procedure and costs of proceedings therein. Within the scope of its authority, rules can be made, amended or repealed as frequently as it considers necessary and the power has been freely used."

It will not be sufficient for legislatures to permit Supreme Courts or other courts to make rules of procedure and leave the matter in that position. Precisely that power was conferred upon the Michigan court in 1850, but sixty-five years elapsed without anything being done by the court in pursuance of its powers.[33] It is necessary for the effective working of the rule-making authority that a body directly charged with that function should be provided as has been done in England. How far such a body would go in the direction of simplifying the

[32] Rosenbaum, Studies in English Civil Procedure, 63 University of Pennsylvania Law Review, 165.

[33] Sunderland, The Michigan Judicature Act of 1915, 14 Michigan Law Review, 273.

present system is of course a matter as to which one cannot prophesy. But an instance or two may point out some of the possibilities. Take, for example, the matter of pleading—a survival from a system of trial that has become almost obsolete in modern practice. The suggestion that formal pleadings be abolished has long since been adopted in part in the English practice; in 1915 it was adopted to the fullest extent in Michigan.[34] In 1881, an official committee composed of Lord Chief Justice Coleridge, Lord Justice James, Justices Hannen and Bowen, Attorney General James, Solicitor General Herschell (later Lord Chancellor) and other distinguished members of the bar expressed themselves as follows: "The Committee is of opinion that, as a general rule, the questions in controversy between litigants may be ascertained without pleadings." They recommended the adoption of a rule that "No pleadings shall be allowed unless by order of a judge."[35] A recent article by Professor Clarke B. Whittier of Stanford University makes out a strong case for the principle of "notice pleading."[36] Even though the reform of pleading may not be so thorough as suggested by the committee of the English bench and bar, or as suggested by Mr. Whittier, much may be done by the provision of common forms by rules of court. This has recently been done in New Jersey.[37] There is no apparent reason why there should not be a single form for negligence cases, for actions in insurance policies, even for specific performance or foreclosure cases. The rule committee or the judicial council, if such a body were created, would of course have the duty to determine what special rules respecting pleading ought to be adopted. It is of interest to note in passing that the Conference of State Bar Association Delegates established by the American Bar Association has recently recommended that a sub-committee on uniform judicial procedure should be created for each state.[38] The study of procedure, if this recommendation be adopted, will be undertaken with more or less enthusiasm in nearly all the States.

---

[34] Id.

[35] Thayer, Preliminary Treatise on the Law of Evidence, 367, n. 3.

[36] Notice Pleading, 31 Harvard Law Review, 501. Cf. Isaacs, Logic v. Common Sense in Pleading, 16 Michigan Law Review, 589.

[37] Practice Act, New Jersey, 1912.

[38] 5 American Bar Association Journal, 38 (January, 1919).

An effective body of opinion can be created by this means which may in time bring about important practical results.[39]

As has already been pointed out one of the greatest difficulties in the way of procedural reform lies in the fact that our system of judicial administration lacks unity. The rule-making power, call it what you will, judicial council or what not, would furnish an important element in securing cohesion in the administration of justice. But more than that is needed—a responsible minister of justice, whether so denominated or not is immaterial. This commissioner or secretary of justice, or judicial superintendent, or chief justice, should be charged with the function of supervising the administrative machinery of the courts. The creation of such an official would give a centre about which might crystallize some sort of organization in place of our present formlessness and lack of organization in judicial matters. It may be pointed out that our state governments present the only instance to be found in the civilized world of utter formlessness in this respect. The Lord Chancellor in the English system though falling short of the continental Ministers of Justice in his powers and responsibilities nevertheless exercises a real control over judicial administration, possessing in effect the appointing power in respect to all judicial officers. Even in our federal system, the department of justice exercises much influence in respect to legislation dealing with the judicial system, and contains, possibly in an unsatisfactory form, the germ of a supervisorial power over the machinery of justice. The American Judicature Society has for some years been advocating in its publications the centralization of the supervision of the courts' administrative functions in some such officer.[40] Its program goes indeed much further and embraces the complete unification of all courts in a single court with a chief justice, an administrative official, at its head, in whom is vested the power of appointing judges as well as of arranging such matters as the assignment of judges to special departments, the arrangement of calendars, and the numerous other administrative problems involved in the workings of the courts. If one cannot entirely agree with all the details of the plan and if local conditions

[39] Pound, A Practical Program of Procedural Reform, 22 Green Bag, 448, explains how bar associations may procure remedial legislation.

[40] See, in particular, Bulletins VI, VII, VIIa, IX, X and XIII.

and local prejudices and predispositions may render necessary certain modifications of its features, the essential idea of a responsible official charged with the general task of supervision of the courts and aided by a council made up of judges and lawyers seems to possess an essential vitality. Take, for example, the matter of improving means for the selection of judges. The existence of a responsible superintendent might, without disturbing the essential principle of popular election, furnish a means whereby the voter might be guided in his choice at the primaries. A recommendation by such responsible official might constitute an important element in the candidate's chances of success, just as the failure to recommend an incumbent might affect his opportunity for re-election unfavorably. It might well be a part of the duty of the judicial superintendent to make such recommendations in the case of candidates for election to judicial offices. To a certain extent he would represent the principle embodied in the Roman institution of the censor. Our present system lacks any organ of responsible criticism, destructive or constructive. In a world whose driving force is opinion, it would seem fundamentally essential that some organ should exist whereby that opinion can be instructed.

These three elements, a procedure fixed by rules instead of by rigid statutes, a proper rule-making body and an official elected to supervise and centralize administrations, are proposals which seem to bear in them the germs of constructive development in procedural law.

V.

Immediate programs of reform however excellent are of small importance in comparison with the cultivation of proper sentiment upon which such programs may rest. Co-operation of bar and bench is absolutely essential to make any system workable. "The Masters and Judges rely as much on the co-operation of solicitors and counsel as they do on the Austinian theory of the binding force of law," we are told by an American student of English procedure.[41] In our own country formerly this co-operation was fostered by the close personal relations existing between lawyers and judges,

[41] Rosenbaum, Studies in English Procedure, 63 University of Pennsylvania Law Review, 105.

relations favored by conditions that forced members of the bench and of the bar to travel together, to live on circuits at the same inns, to meet on the familiar plane of neighborly intercourse.[42] Modern customs of life, especially in cities, tend to produce impersonal relations between court and counsel and between members of the bar. There is little opportunity or desire for close associations, and such associations as exist are social rather than professional. The spirit of co-operation is impaired and thus one of the strongest influences upon the development of the law, professional opinion, an influence that has been most powerful in the evolution of other legal systems, is minimized in America.

One of the most hopeful signs for jurisprudence is the growing interest of lawyers in bar associations and their work. If such institutions served only to compel closer and more numerous contacts between members of the profession, they would serve a most desirable purpose in stimulating group consciousness and along with such group consciousness that which is closely associated with it, the professional instinct, what Professor Veblen calls the instinct of workmanship. But already such organizations have achieved much in the way of direct improvement of legal conditions. The gradual elevation, for example, of the standards of legal education and of admission to the bar is in large part due to the consistent support of the American Bar Association. To the influence of that association also belongs much of the credit for the growing interest in procedural reform—the Equity rules of the Supreme Court and the amalgamation of equitable and legal procedure are the direct results of its efforts. The recent movement whereby the national association is brought closer to the state associations by the conferences of delegates from the latter organizations promises well for legal progress on broad and intelligent lines. The future of procedural reform is in the hands of a trained profession.[43]

Orrin K. McMurray.

Berkeley, California.

---

[42] See the interesting description of the friendship between Lincoln and David Davis in Hill, Lincoln the Lawyer.

[43] On the development of the bar association movement, begun in 1878, with the creation of the American Bar Association, see Cohen, The Law: A Business or a Profession?